UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY, Employer, and COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA), Petitioner.	))))))))))	Case 13-RC-121359

BRIEF FOR PETITIONER
COLLEGE ATHLETES PLAYERS ASSOCIATION

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Petitioner College Athletes Players Association ("CAPA") submits this brief pursuant to the Board's Notice and Invitation to File Briefs ("Briefing Notice"). As we will show, the grant-in-aid scholarship football players at Northwestern University are "employees" within the meaning of Section 2(3), and the Act requires that as employees they be accorded the right to organize and to bargain collectively over the terms and conditions of their employment.

INTRODUCTION AND SUMMARY OF ARGUMENT

Northwestern University football players seek a collective voice in their workplace health and safety and other aspects of their football responsibilities and working conditions. Through CAPA, they requested a secret-ballot election to be conducted by the National Labor Relations Board. The Regional Director found that Northwestern grant-in-aid scholarship football players ("the players") are employees who have the right to vote under the National Labor Relations Act ("NLRA" or "Act") on whether to be represented by CAPA. That vote was held on April 25, 2014, and the ballots have been impounded pending the Board's review.

The application of NLRA rights to scholarship football players presents an unusual context, prompting national interest. Still, at its core, this case involves the same questions that arise in every representation case: Do the players perform services for the university? Do they work under the university's supervision and direction? Do they receive compensation for their work? And it can be resolved by applying settled Board law and legal principles.

Applying those settled principles to the extensive factual record, the Regional Director found that the Northwestern scholarship football players are "employees" under Section 2(3) of the Act. The Regional Director's Decision and Direction of Election ("DDE") is well-reasoned and fully supported by the record and the law. And thus, under the Act, the players are *entitled* to an election, and to pursue a collective voice to address their working conditions.

In this brief we address the questions raised in the Briefing Notice, and in so doing, we show why the Northwestern players are employees within the meaning of Section 2(3), why they are entitled to representation, and why the Regional Director's Decision should be affirmed.

First, we show that the Regional Director was correct in applying the common law test of employee status to determine whether the players are "employees" within the meaning of Section 2(3). We further show that applying that test to the factual record demonstrates that the players are employees under the Act. *See* Briefing Notice, Question 1; Argument § I.

Second, we show that recognizing the employee status of the players and allowing them the right to organize and collectively bargain over the terms and conditions of their employment is consistent with the purposes of the Act. Northwestern's contention that the Board's decision in *Brown University*, 342 NLRB 483 (2004), mandates a different outcome is erroneous. The Regional Director correctly held that *Brown* is "inapplicable in the instant case because the players' football-related duties are unrelated to their academic studies unlike the graduate assistants whose teaching and research duties were inextricably related to their graduate degree requirements." DDE at 18. *Brown* rests on dubious analysis as it is, *see* 342 NLRB at 493-500 (Members Liebman and Walsh, dissenting), but regardless of its continued validity,[1] the Board's decisions in this area demonstrate that employee status does not turn on some general notion of whether one is "primarily" a student or "primarily" an employee. Rather, the relevant policy consideration in determining whether common law employees – students or otherwise – may be denied their NLRA rights is if collective bargaining in that setting would not promote the purposes of the Act, such as with the Board's treatment of "confidential" employees. Here,

[1] *See New York University*, 356 NLRB No. 7 (2010) (noting there are "compelling reasons for reconsideration of the decision in *Brown*"); *New York University*, 2012 WL 2366171 (NLRB June 22, 2012). After the Board granted review but before it rendered a decision, the parties reached a settlement.

allowing bargaining over the players' *football* duties would not inherently intrude upon Northwestern's academic freedom or otherwise conflict with the purposes of the Act. Nor does the existence of outside constraints render bargaining entirely infeasible in this setting. There are many areas that remain open to bargaining under current NCAA rules – such as medical benefits and player safety issues – and, in any event, those rules are in the process of change. *See* Briefing Notice, Questions 2-3, 6; Argument § II.

Third, we show that neither the non-statutory policies invoked by Northwestern nor the existence or absence of determinations of scholarship football players as employees in other settings is relevant to whether the players are employees within the meaning of Section 2(3). The players satisfy the common law test of employee status and permitting them to organize and engage in collective bargaining promotes the purposes of the Act. The players are therefore entitled to all the rights and protections afforded by the Act. *See* Briefing Notice, Questions 3-4; Argument § III.

And **fourth**, we show that recognizing the employee status of the players creates no tension with the antidiscrimination provisions of Title IX or the employment discrimination provisions of Title VII. Thus, neither statute is relevant in determining whether the players are employees and should be afforded their NLRA rights. *See* Briefing Notice, Question 5; Argument § IV.

SUMMARY OF FACTS

The Regional Director's Decision contains detailed factual findings based on the extensive evidentiary record developed below. *See* DDE at 2-13. We therefore include only a brief summary of those facts here.

I. NORTHWESTERN UNIVERSITY AND ITS FOOTBALL PROGRAM

Northwestern is a private university located in Evanston, Illinois. Northwestern has approximately 8,400 undergraduate students. *Id.* at 2. Northwestern is a member of the National Collegiate Athletic Association ("NCAA"), a private voluntary association comprised of collegiate institutions across the country. *Id.*; Tr. 557:9-23 (Baptiste). Its football program competes in the top college football division—Division I-A or the Football Bowl Subdivision ("FBS")—and is part of the nationally-known Big Ten Conference. DDE at 2-3. The football team consists of about 112 players, of which there are 85 players who receive football grant-in-aid scholarships that pay for their tuition, fees, room, board, and books. *Id.* at 3. The football program is run by a professional coaching staff led by head coach Patrick Fitzgerald, Jr. Coach Fitzgerald's staff includes a Director of Football Operations, Director of Player Personnel, Director of Player Development, nine full-time assistant coaches, four graduate assistant coaches, and five full-time strength coaches. *Id.* In addition, Coach Fitzgerald has a nine-member operations staff, a three-member quality control staff, and a video department, all of whom report to him. Jt. Ex. 17 at 10; Tr. 1021:21-1022:9 (Fitzgerald).

II. THE PLAYERS' YEAR-ROUND FOOTBALL DUTIES

As evidenced through witness testimony and Northwestern documents detailing the daily life of a football player, the players have extensive mandatory football-related duties that they perform throughout the year. DDE at 5-9, 15-17. These duties can be broken into eight periods:

Training camp:	approximately August 1-31
Regular season:	approximately September 1 through the end of November
Post-season:	approximately December 1 to end of December or early January
Winter workouts:	mid-January to mid-February
"Winning Edge":	one week period after winter workouts
Spring football:	immediately following Winning Edge through mid-April
Spring workouts:	late April through May
Summer workouts:	mid-June through end of July

Throughout the year, "the coaching staff prepares and provides the players with daily itineraries that detail which football-related activities they are required to attend and participate in." *Id.* at 5.

Training camp is "considered the most demanding part of the season," and the players spend "50-60 hours per week on football related activities." *Id.* at 5, 6. During the regular season, the players devote 40-50 hours a week to football-related activities, which includes practices, meetings, film sessions, and workouts, as well as the "12 games played against other colleges, usually played on Saturdays." *Id.* at 6. As the Regional Director found, "[t]hese games are clearly a large time commitment for the players regardless of whether it is a home or an away game. In fact, if the team is playing an away game, it is not unusual for the players to have to spend 25 hours over a two day period traveling to and from the game, attending practices and meetings, and competing in the game." *Id.* at 15-16.

After the regular season, there is the potential for the team to participate in a bowl game, as Northwestern has in five of the past six seasons.[2] In those years, Northwestern extended its football season by an additional month and the record shows that "[t]he coaches expect the players to devote the same amount of hours on their football duties during the postseason (40 to 50 hours per week)." *Id.* at 8.

The players continue to engage in mandatory football activities after the football season ends. The players' off-season football responsibilities include not only the intensive one-month training camp noted above, but also mandatory workouts during the winter, spring, and summer,

[2] Northwestern played in the Alamo Bowl in the 2008 season, the Outback Bowl in the 2009 season, the TicketCity Bowl in the 2010 season, the Meineke Car Care Bowl in the 2011 season, and the Gator Bowl in the 2012 season. *See* www.collegefootballpoll.com/bowl_history_northwestern.html.

which are conducted by the football team's strength and conditioning coaches; a one-week period called "Winning Edge" that involves "demanding competitions to test [the players'] levels of conditioning"; and Spring football, in which the players "resume practicing football skills" as they prepare for the upcoming season. *Id.* at 8-9.

III. NORTHWESTERN'S CONTROL OVER THE PLAYERS' FOOTBALL DUTIES

As the Regional Director found, the players perform their football duties under the comprehensive supervision and control of Northwestern football coaches and Athletic Department staff. *Id.* at 4-5, 15-17. The record shows that the "location, duration, and manner in which the players carry out their football duties are all within the control of the football coaches." *Id.* at 15. For instance, during training camp, the players are provided detailed itineraries prepared by the coaching staff that "set forth, hour by hour, what football related activities the players are to engage in from as early as 5:45 a.m. until 10:30 p.m., when they are expected to be in bed." *Id.* The coaching staff similarly schedules and directs the players' football activities throughout the year. *See* Jt. Ex. 18. In addition, the players are subject to special rules found in the Team Handbook and Athletic Department Handbook that are not applicable to the general student body. DDE at 4-5. Furthermore, the coaches maintain control over the players by monitoring their adherence to these rules and disciplining them for violations. *Id.* at 16.

IV. THE PLAYERS ARE COMPENSATED BY NORTHWESTERN

The players are compensated by Northwestern for performing their football responsibilities in the form of scholarships. The players receive these football scholarships only because they are football players. *Id.* at 3-4, 14-15. They will lose those scholarships upon withdrawal or dismissal from the football team, whether or not they remain students. *Id.*

Northwestern "expends between $61,000 and $76,000 per scholarship per year or in other words over five million dollars per year for the 85 scholarships." *Id.* at 19.

V. FOOTBALL IS NOT PART OF NORTHWESTERN'S ACADEMIC PROGRAM

The Regional Director found that football activities are separate from the players' academic pursuits. The "players do not receive any academic credit for their playing football and none of their coaches are members of the academic faculty." *Id.* at 11, 18. Moreover, the football-related duties of the players are "unrelated to their academic studies," and they are "not required to play football in order to obtain their undergraduate degree, regardless of which major they pursue." *Id.* at 18, 19. The record also "makes clear that the Employer's scholarship players are identified and recruited in the first instance because of their football prowess and not because of their academic achievement in high school." *Id.* at 9; Tr. 1169:11-1170:22 (Fitzgerald); Tr. 1199:6-14 (Watson).

VI. NORTHWESTERN'S FOOTBALL PROGRAM IS A COMMERCIAL ENTERPRISE

The record also demonstrates that Northwestern football is a commercial enterprise from which the university derives substantial financial benefits. The services the players provide enable Northwestern to have a football program that competes in the highest division of college football. The football program generates significant revenue, including from ticket sales, television broadcast contracts, and the sale of football team merchandise. DDE at 13. As members of the Big Ten Conference, Northwestern shares in substantial revenue generated through football television contracts and bowl game participation. Tr. 344:12-21 (Berri); Tr. 558:2-13 (Baptiste). From 2003 through 2012, Northwestern reported total revenues of approximately $235 million from its football program. DDE at 13.

ARGUMENT

I. THE REGIONAL DIRECTOR CORRECTLY FOUND THAT THE PLAYERS ARE EMPLOYEES UNDER SECTION 2(3) OF THE ACT (QUESTION 1)

A. The Common Law Test is the Appropriate Test to Determine Whether an Individual is an "Employee" Under the Act

Section 2(3) broadly defines the term "employee" to include "any employee." 29 U.S.C. § 152(3). In *NLRB v. Town & Country Electric, Inc.,* 516 U.S. 85 (1995), the Supreme Court explained that a determination as to employee status under the Act must be based on the ordinary meaning of the term "employee," as reflected in the common law concept of a "master-servant" relationship. *Id.* 89-94. "[W]hen Congress use[s] the term 'employee' in a statute that does not define the term, courts interpreting the statute 'must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of th[at] ter[m],'" which is "the conventional master-servant relationship as understood by common-law agency doctrine." *Id*. at 94 (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992)). As Congress did not "clearly indicate[ ] otherwise" in the NLRA, *Town & Country* and *Darden* "teach us not only that the common law of agency is the standard to measure employee status but also that [the Board has] no authority to change it." *Roadway Package Sys., Inc.*, 326 NLRB 842, 849 (1998).

Of course, "[the] presumption that Congress means an agency law definition for 'employee' unless it clearly indicates otherwise," *Darden*, 503 U.S. at 325, must be applied in a manner that is "consistent with . . . the Act's purposes." *Town & Country*, 516 U.S. at 91; *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) ("extending the coverage of the Act to [undocumented aliens] is consistent with the Act's avowed purpose of encouraging and protecting the collective bargaining process"). But any "departure from the common law of agency," *Town & Country*, 516 U.S. at 94, must be based on a statutory policy that clearly requires such a departure.

Here, the factual record establishes that the players are employees under the common law test. Moreover, as will be discussed in Section II *infra*, there is no statutory policy that would justify denying them the right to organize and to engage in collective bargaining.

B. The Players Satisfy the Common Law Test of Employee Status

At common law, an employee "was one who performed services for another and was subject to the other's control or right of control," generally for "[c]onsideration, *i.e.*, payment." *Boston Medical Center Corp.*, 330 NLRB 152, 160 (1999). *See also* Restatement (Second) of Agency § 2(2) (defining "servant" as "an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master"); *New York University*, 332 NLRB 1205, 1205-06 (2000) (*Town & Country* teaches that "[t]he definition of the term 'employee' reflects the common law agency doctrine of the conventional master-servant relationship . . . [which] exists when a servant performs services for another, under the other's control or right of control, and in return for payment"); *Brown University*, 342 NLRB at 483 n.3 (recognizing that in *New York University* the Board "rel[ied] on *NLRB v. Town & Country*" in defining "employee" in accordance with that common law standard).[3]

[3] Citing footnote 27 in *Brown*, the Regional Director stated that, "[u]nder the common law definition, an employee is a person who performs services for another *under a contract of hire*, subject to the other's control or right of control, and in return for payment." DDE at 13 (emphasis added). However, footnote 27 expressed only Member Schaumber's view, and in suggesting that the common law definition requires a "contract of hire," Member Schaumber erred. The Board did not cite "contract of hire" as an element of the common law test in *Boston Medical Center* or *New York University*, nor did it do so in footnote 3 of *Brown*. Restatement § 2(2), quoted above, does not require a "contract of hire" as an element of a "master-servant" relationship. Courts and commentators have noted that the elements of "contract" or "hire" are not essential to employee status at common law, but are additional elements found in *workers' compensation statutes* which adopt a narrower definition of "employee." *See Hubbard v. Henry*, 231 S.W.3d. 124, 129 (Ky. 2007) ("[U]nlike the common law of master and servant, most compensation acts impose 'contract' and 'hire' requirements as pre-requisites to employee

The Regional Director correctly found that each of these elements is present here – the players perform services for Northwestern under the University's control, and they are paid for doing so – and thus, the players "fall squarely within the Act's broad definition of 'employee.'" DDE at 17.

1. The Players Perform Services for Northwestern.

The duties of Northwestern's scholarship football players were described in detail in the uncontroverted testimony of former Northwestern co-captain Kain Colter,[4] and confirmed by Northwestern internal documents, *see, e.g.*, Jt. Ex. 18, and testimony from Northwestern officials.[5]

As the Regional Director found, the players' season begins in August, before school is in session, with a month-long training camp during which the players devote 50 to 60 hours per week to practices, meetings, review of film, rehabilitation and treatment of injuries, and other football activities. DDE at 5-6. Then comes the 12-game regular season, during which, from late August through at least November or early December, the players' time is consumed with games, practices, review of film, conditioning, meetings, travel, media obligations, medical treatment and travel, amounting to 40 to 50 hours per week. DDE at 6-8.

In years when Northwestern qualifies for a post-season bowl game, the players' activities continue at that intense level into January. *Id.* The student body will have left campus in early

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status"); *Daleiden v. Jefferson City Jt. Sch. Dist. No. 251*, 80 P.3d 1067, 1070 (Idaho 2003) (same). But in any event, contracts of hire do exist here. *See infra* note 16.

[4] Colter, who is a founding member of CAPA, played football at Northwestern for four seasons, was a team co-captain for his last two years, and served on the team's leadership council. Jt. Exs. 2, 7; Tr. 57:3-8, 58:25-59:4 (Colter).

[5] For example, Northwestern deputy director of athletics Janna Blais agreed that "when you aggregate the amount of hours that Mr. Colter talked about that were mandatory – the travel, the games, the meetings, the practices" – Colter's estimates of the time the players devote to those mandatory duties were reasonable. Tr. 795:20-796:18, 996:17-997:2.

December and the dormitories will have closed, but the players remain to prepare for the bowl game, with those who live on campus moving into a hotel. DDE at 8 and n.18. The players are allowed to travel home for a few days but must return to prepare for the game – in at least one year, having to be back by Christmas morning. *Id.* at 8. To ensure that players meet this schedule, they are required to give their flight itineraries to their position coaches – as they must do whenever they fly home. *Id.* at 8 and n.19.

After these five months of 40-60 hour football weeks, the players then have two "discretionary weeks." But even during this period, many still work out in the weight room.[6] This is followed by a month of mandatory winter workouts, requiring 12-15 hours per week, and then a week of intense workouts and conditioning drills known as "Winning Edge," consuming 15-20 hours. *Id.* at 8-9. Spring football follows immediately, and runs through mid-April. During that period the players devote 20-25 hours per week to practices (wearing pads and helmets), meetings, film review, required weightlifting and other duties. *Id.* at 9.

Between the conclusion of Spring football and the end of the academic year in June, apart from two discretionary weeks, the players engage in mandatory workouts similar to those performed in the winter. *Id.* at 9. The student body then leaves for the Summer; but, after a couple of discretionary weeks, the players must report back to campus for Summer workouts,

[6] During those two weeks and the eight other "discretionary weeks" throughout the year, coaches are not allowed to conduct the players' workouts, but they can monitor them, and team leaders "attempt to ensure that attendance is high at these optional workouts." *Id.* at 8. Coach Fitzgerald established a "leadership council" of players who were expected to exert influence on their teammates "to improve . . . the running of the program." Tr. 1116:8-18 (Fitzgerald). From the leadership council meetings with Coach Fitzgerald, team leaders understood that high attendance at the "discretionary" workouts was important, and they exerted peer influence to achieve this. Tr. 130:1-14, 132:24-133:14, 306:19-307:10 (Colter); Tr. 1154:15-1155:16 (Fitzgerald).

which require 20-25 hours per week and continue until a new football year begins with training camp in August. *Id.*

Consistent with this record evidence, Coach Fitzgerald characterized the players' football responsibilities as a "full-time job." Tr. 1159:14-1160:18.[7] But, whether the services the players perform are considered to be full-time or part-time,[8] those services – practicing, playing in games, attending meetings, reviewing film, participating in workouts, meeting with media, and the rest – are services of *employees.* Indeed, they are the same kinds of valuable services as professional football players perform.

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[7] Coach Fitzgerald's "full-time job" reference was first made in a July 2013 newspaper article. Pet. Ex. 10. Although the article does not make clear whether Coach Fitzgerald was referring to the player's football obligations or total obligations, in his testimony Coach Fitzgerald made clear that a player's *football responsibilities* constitute a full-time job. Tr. 1159:14-1160:18. *See also* Pet. Ex. 5 at 9 (current NCAA President Mark Emmert acknowledging that "student-athletes in some sports are putting in 30-to-40 hours a week, well that's a full-time, uh, commitment") (available at http://www.youtube.com/watch?v=02aKLJzsV2k&feature=player_detailpage#t=2254).

Northwestern has sought to minimize the hours worked, citing NCAA rules relating to the number of hours that must be reported as "countable athletically related activities" ("CARA"). University witnesses conceded, however, that the CARA rules omit many hours the players are required to work. Tr. 509:16-17, 567:4-568:10, 573:7-10 (Baptiste); Tr. 1126:5-21 (Fitzgerald). For example, the NCAA rules state that football activities on a game day are to be reported as only three hours. Tr. 567:14-16 (Baptiste). But the evidence shows that even if the game itself may last only three hours (although games sometimes run longer), the players spend an additional four to ten hours on scheduled football activities *before the game even begins*. Tr. 116:12-17 (Colter); Tr. 1123:22-1124:2 (Fitzgerald); Jt. Ex. 18 at NU001259, 1267, 1276, 1284, 1292, 1302, 1306, 1320, 1329, 1343, 1347, 1443, 1450, 1460, 1473, 1482, 1492, 1500, 1509, 1525, 1532, 1542. Similarly, none of the time spent on required football activities during the August training camp period is counted under NCAA rules. Tr. 514:13-17 (Baptiste). The Regional Director correctly based his decision on the evidence demonstrating the actual time spent by the players on football activities, rather than the NCAA CARA rules that omit much of that time. DDE at 6 n.11, 8 n.17.

[8] Employees need not be full-time to have the right to organize and bargain collectively. *See, e.g., Univ. of San Francisco*, 265 NLRB 1221 (1982) (approving unit of part-time faculty); *Teamsters Local 952 (Pepsi Cola Bottling Co. of L.A.)*, 305 NLRB 268 (1991) (approving unit of part-time merchandisers).

Moreover, these services are provided "for another," *Boston Medical Center*, 330 NLRB at 160, making out the common law agency relationship. The Regional Director explained why this is so:

> Clearly, the Employer's players perform valuable services for their Employer. Monetarily, the Employer's football program generated revenues of approximately $235 million during the nine year period 2003–2012 through its participation in the NCAA Division I and Big Ten Conference that were generated through ticket sales, television contracts, merchandise sales and licensing agreements. The Employer was able to utilize this economic benefit provided by the services of its football team in any manner it chose. Less quantifiable but also of great benefit to the Employer is the immeasurable positive impact to Northwestern's reputation a winning football team may have on alumni giving and increase in number of applicants for enrollment at the University.

DDE at 14.

Each year from 2003 to 2012, Northwestern reported a net profit from its football program ranging from more than $5 million to nearly $10 million, with the total excess of revenue over expenses amounting to $76.3 million over that time period, Tr. 371:15-16 (Berri); Pet. Ex. 5 at 5-6; Pet. Exs. 6a-6b – even after paying the head coach approximately $2 million a year, Tr. 696:10-20 (Green). Northwestern enjoyed other benefits from the football program. For example, it saw applications for admission increase by 21% following the football season in which the team won the Big Ten conference title and played in the Rose Bowl, and a study showed that media mentions of Northwestern increased by 185% following that same football season. Pet. Ex. 5 at 8 & n.27. Northwestern also sells merchandise bearing its football players' names, jersey number, and images; uses images of the football players in marketing materials; and requests players to sign autographs that are donated, sold, or auctioned for the University's benefit. Pet. Ex. 2; Er. Ex. 31 at 41; Tr. 155:22-157:11, 158:10-159:13 (Colter).

Thus, the football program is a commercial enterprise of great value to Northwestern, and it cannot reasonably be characterized as an "extracurricular activity" offered by the university. As sports economist and professor David Berri concluded, with respect to the FBS division in which Northwestern participates, there is a "consistent story told through the years that this is a business that is trying to increase revenues, and that's what it is trying to accomplish." Tr. 381:10-13. Indeed, just as the services the players provide are of the same nature as an NFL player provides, the revenues the football program generates as a result of those services – "through ticket sales, television contracts, merchandise sales and licensing agreements," DDE at 14 – are of the same nature as an NFL team. Tr. 345:10-17, 381:16-20, 383:23-384-15 (Berri); Pet. Ex. 5 at 6-7, 10.

To quote a former NCAA President: in Division 1 schools "athletics programs are treated as auxiliary enterprises within the university." Pet. Ex. 5 at 9 (statement by Cedric Dempsey). The "business model" of these "auxiliary enterprises" is similar to that of commercial enterprises – in particular, of professional sports teams. Tr. 378:7-379:8, 380:12-381:4, 381:16-20 (Berri); Pet. Ex. 5 at 3, 9. In short, the players' services for Northwestern's football enterprise are rendered for the enterprise and for the university that operates it.

2. The Players' Services are Subject to Northwestern's Control.

The players' services are "subject to [Northwestern's] control or right of control." *Boston Medical Center*, 330 NLRB at 160. The record is undisputed that the players perform their required football duties, including practices, games, meetings, workouts and other activities, under the direction and supervision of the football coaching staff. DDE at 15-16. Coach Fitzgerald, in consultation with his staff, determines the specific day-to-day tasks to be performed by the players, which are set forth in detailed schedules and itineraries prepared by Coach Fitzgerald with input from his staff. Tr. 1077:7-1078:1, 1102:17-1103:9, 1136:23-1139:6

(Fitzgerald); Jt. Ex. 18. Players are required to adhere to these schedules and are subject to discipline if they fail to do so. Tr. 1076:15-1078:17, 1091:6-1095:1, 1109:7-1110:13, 1111:2-1112:4 (Fitzgerald). Thus, most of the services the players provide are mandatory in every sense and are closely supervised by the football coaching staff. This more than suffices to demonstrate the requisite "control or right of control" that characterizes the common law employment relationship. DDE 4-5, 15-17.

In view of the nature and extent of the activities that are directly supervised by the coaches, it is of no consequence that, during certain periods of time and as to certain activities (such as watching film and participating in certain drills and workouts), a player is supposedly not required to participate in every activity at a specific time, and may not always be directly supervised in doing so. Those activities, which are directly connected to the players' core duties, and in which the players are expected to participate,[9] are "akin to the . . . activities of an actor rehearsing lines or musicians practicing their instrument on their own time to enhance their performance in a commercial production." DDE at 17 n.35. Such so-called "voluntary" activities on an employee's "own time" are not inconsistent with employee status. It is common in entertainment industries, including professional sports, that an employee who performs as part

[9] For example, the film the players watch is prepared by staff within the football program, which has its own video department responsible for filming every practice and uploading these videos to a database accessible from computers in the football facility. Tr. 141:9-13 (Colter); Tr. 1022:7-9 (Fitzgerald); Jt. Ex. 17 at 10. The players watch this film at the football facility with their teammates for the purpose of improving their football performance, and during the season the players also watch film to prepare for the upcoming games by studying their opponents' tendencies and the types of plays they run. Tr. 104:5-107:4, 140:19-141:20 (Colter). As for "discretionary" workouts, Tr. 620:15-18, 621:16-622:3 (Baptiste), they take place at the football facility; the strength and conditioning coaches prepare instructional sheets for the players describing exercises they can perform; those coaches are permitted to monitor the workouts; and as has been noted, obtaining "high attendance" at these workouts was a topic of discussion at the players' leadership council meetings run by Coach Fitzgerald. *See supra* note 6; Tr. 80:20-23, 130:1-14, 133:5-14, 304:6-22 (Colter); Tr. 620:15-18, 621:16-622:3 (Baptiste); Tr. 1116:3-23 (Fitzgerald); Pet. Ex. 7.

of a group must also engage in individualized training and practice, often without direct supervision.

Northwestern has suggested that players are free to neglect their football duties if they feel their academic interests would be better served by doing so. That suggestion is contrary to the factual record. Northwestern witness Blais testified that the timing of football practice determines "[the] class options [the players may] select from." Tr. 842:15-843:2. Coach Fitzgerald confirmed this, testifying that he scheduled practices in the morning rather than the afternoon because there are fewer classes in the morning, and so a morning practice schedule would "*allow* our young men to take more classes." Tr. 1040:11-1041:1 (emphasis added). But, as to classes that do meet in the morning, other than during the summer "you're basically just not allowed to schedule things early in the morning that would conflict with football." Tr. 144:4-11 (Colter). Specifically, the players "[a]re not allowed to" schedule a class before 11:00 am. Tr. 137:8-10, 144:4-11 (Colter); *see also* Tr. 143:7-144:11, 169:4-170:2, 172:5-17, 222:6-223:1 (Colter).[10]

Just as football obligations determine which courses a player will be "allow[ed] to take," only in rare circumstances are scholarship players excused from practice due to class obligations

[10] Northwestern's records show that the players rarely schedule any morning classes at all, except notably on Fridays when there is no practice. Er. Ex. 22; Tr. 848:24-849:2 (Blais). Northwestern deputy director of athletics Blais, who has responsibility within the Athletic Department for "student-athlete welfare" including "academic services," Tr. 796:3-13, could identify only a single instance in which a scholarship player scheduled a class earlier than 11:00 am on any practice day. Tr. 1007:1-9. (Players could take classes that begin at 11:00, because, as Coach Fitzgerald explained, practice typically starts at 6:50 am "and then we're typically done at 10:30, from a meeting standpoint." Tr. 1041:17-18.) Blais further explained that the occasions on which a football player is permitted to "take [a] class [that conflicts with practice] and our coaches work around it" are limited to circumstances where the course is "a requirement" and the player cannot "reasonably" take that course in the summer. Tr. 841:24-842:6.

– although more leniency is given to walk-ons, *see* DDE at 11. The testimony of former player John Henry Pace illustrates how narrow is the leeway granted to players. Pace needed to take a 9 a.m. class or he would not "be able to graduate and keep on track." Tr. 1272:19-21. Pace was a "long snapper," and "all the team duties as a long snapper start at the beginning of practice." Tr. 1272:24-1273:1. In addition, he needed only one team member to be present to perform his drills. Tr. 1284:17-1285:11. Under those circumstances, Coach Fitzgerald allowed Pace to leave practice early after he first completed his "team duties" – but only "on the promise that [he] would come back and do individual drill work later in the day, which [he] always did." Tr. 1273:2-7 (Pace).[11]

As this example shows, to the limited extent that accommodations may sometimes be made when football duties conflict with class obligations, they merely represent the kind of flexibility afforded by many employers to their employees. This does *not* suggest that the players are not employees.

In addition to the direct control exerted by the coaching staff over the performance of the players' football duties, to promote the success of its football business, Northwestern exerts control over many other aspects of a player's life by rules that do not apply to the general student body. *See* DDE at 4-5, 16-17. The players are subject to a drug and alcohol policy which, unlike the policy applicable to the regular student body, provides for mandatory testing. Tr. 164:9-14 (Colter); Tr. 1082:6-10 (Fitzgerald); Jt. Ex. 10; Jt. Ex. 22 at 141. Players also must conform to a dress code imposed by the coaching staff, Tr. 114:24-115:7, 161:21-162:16 (Colter); Tr. 1082:11-1083:7 (Fitzgerald); must have their off-campus housing approved by Coach Fitzgerald, Tr. 154:17-155:13, 309:25-310:2 (Colter); are required to make media appearances as directed

[11] The record also reveals only one instance in which a player was excused from a week of practice because he had fallen behind academically. Tr. 1061:8-1062:7 (Fitzgerald).

by the University, Tr. 117:10-16 (Colter); Tr. 1083:8-14 (Fitzgerald); Jt. Ex. 17 at NU00177; and are prohibited from providing any media interview unless arranged by the Athletic Department, Jt. Ex. 17 at NU00179; Tr. 1083:8-14 (Fitzgerald). Players who wish to leave campus on Thanksgiving Day are told to stay within a six-hour radius of Northwestern. Tr. 122:12-123:5 (Colter).

The players also are subject to a separate social media policy that is not applicable to the regular student body, under which they must provide the Athletic Department "full access…to any and all personal online networking pages." Jt. Ex. 17 at NU000159; Tr. 152:9-21, 153:12-154:12 (Colter). Compliance is enforced by the Athletic Department and violations can result in dismissal from the football program and loss of the player's athletic scholarship. Tr. 625:22-626:10 (Baptiste). Players must get approval from the Athletic Department before they can work anywhere else, Tr. 192:22-193:11 (Colter); Tr. 1083:15-21 (Fitzgerald), and a player who wants to transfer to another school to play football must sit out a year before he can compete for the new school. Jt. Ex. 22 at 170. Each player must relinquish all rights to any compensation from the use of his name, image, and likeness. Jt. Ex. 10 at "Student-Athlete Name and Likeness Release"; Tr. 157:12-158:9 (Colter); Tr. 1081:23-1082:5 (Fitzgerald). All of those rules and control over the players enhance the benefits Northwestern derives from the players' services.

3. The Players' Services Are Provided in Return for Payment.

Having established that the players perform services for the University under its control, the only remaining question under the common law test is whether the players receive payment for those services. They do.

Northwestern's scholarship football players are recruited by the coaching staff "because of their football prowess," DDE at 9, and are "offer[ed] a full scholarship" by "the Northwestern

Football Staff and [the Head Coach]," *id.* at 10 (quoting Er. Ex. 5 at NU000967).[12] These full scholarships are worth $61,000 for each academic year, or $76,000 if the player takes summer classes. *Id.* at 3 and n.4. The financial terms are specified in the scholarship "tender" each player signs, *id.* at 4, which specifies seven grounds on which the scholarship can be canceled or nonrenewed. One such ground is where a player decides to "[v]oluntarily withdraw from [the] sport . . . for any reason." Er. Ex. 5 at NU000971. Other grounds for cancellation or nonrenewal are where a player renders himself ineligible for intercollegiate competition, or engages in serious misconduct, or abuses team rules as determined by the coach or athletic administration. *Id. See* DDE at 4.[13]

The compensation provided by a Northwestern football scholarship is fundamentally different in purpose and amount from the financial aid provided to students generally. Northwestern's financial aid brochure does not mention athletic scholarships, except to state, under the heading of "Other Useful Resources," that "[i]f you believe you might qualify for an NCAA Division I athletic scholarship, contact the appropriate Northwestern coach." Er. Ex. 13 at 16. For non-athletes, "Northwestern scholarship funds are awarded in accordance with [the

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[12] The players must be deemed capable of succeeding academically at Northwestern, and many of them are fine students. But even for the football recruits with the strongest academic credentials, "[t]he scholarship itself [i]s for athletic purposes," Tr. 1314:24-1315:6 (Ward), "to perform the athletic service," Tr. 145:11-14 (Colter).

[13] There have been instances in which a Northwestern player's scholarship was nonrenewed for "[v]iolation of team rules." Tr. 741:14 (Lindley). In such a case the decision to nonrenew the scholarship is made by the Athletic Director upon the recommendation of Coach Fitzgerald. DDE at 4; Tr. 1045:5-17, 1175:6-1176:3 (Fitzgerald).

Northwestern has attempted to make much of the fact that a player does not lose his scholarship if he does not play due to injury or a low position on the depth chart. But in professional sports, players often are paid while injured. Tr. 423:8-424:1 (Berri). Nor is it uncommon for a professional player to continue to receive payment while benched. Tr. 441:6-19 (Berri). It is neither surprising nor inconsistent with employee status that Northwestern players, as at other schools, are given some job security in the event of injury or the loss of their standing on the depth chart.

University's] need-based financial aid policy." Er. Ex. 14 at 1. Under that policy, "[t]he University does not award its scholarships based on academic merit; it reserves this assistance for students who would not otherwise be able to attend." Tr. 759:17-23 (Lindley); Pet. Ex. 9 at 3. Need-based aid typically includes a package of loans, grants and work-study, with only a fraction of the cost of attendance being covered by the grant. Er. Ex. 13 at 4.[14]

Football scholarships, in contrast, are awarded without regard to whether a player has financial need. In addition, those scholarships consist entirely of grants so that a player's family is not required to pay anything. Nor is the player required to borrow or to take any job apart from his football duties.[15]

Northwestern's football scholarships thus constitute payment for services, consistent with employee status. All that is required is "a rudimentary economic relationship . . . between employee and employer." *WBAI Pacifica Found.*, 328 NLRB 1273, 1274 (1999). Thus, in *Seattle Opera Ass'n*, 331 NLRB 1072 (2000), *enf'd.*, 292 F.3d 757 (D.C. Cir. 2002), the Board found auxiliary opera choristers to be employees where the only compensation was $214 for each opera production in which they performed – with six to eight performances being required per production – and a few tickets to dress rehearsals. *See* 331 NLRB at 1072 and n.1. The Board considered it sufficient that "auxiliary choristers . . . receive *some* monetary compensation for their work." *Id.* at 1073 (emphasis added). The D.C. Circuit agreed. 292 F.3d at 763-64.

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[14] As of 2013-2014, the average grant received by students with parent income above $90,000 was less than half of the cost of attendance, and even for students with parent income below $30,000, the average grant covered only about two-thirds of the cost. *Id.* at 6.

[15] Most other scholarship athletes at Northwestern do not receive a full grant. Employer Exhibit 16 shows that in 2013-14 the University gave full-ride equivalency athletic aid to 169 individuals. This total included 88 football players, each of whom received aid at the 100% level. In contrast, of the 305 athletic aid recipients who were not football players, only 81 received 100%, and 86 received less than 24%.

Unlike the volunteers in *WBAI* who received "no wages *or fringe benefits*," 328 NLRB at 1275 (emphasis added), Northwestern's scholarship football players receive "some monetary compensation for their work." *Seattle Opera*, 331 NLRB at 1073. This does not include wages, but the players receive in-kind benefits that Board law recognizes as constituting compensation. These include room and board provided by the employer, which, as "emoluments of value arising out of the employment relationship," are included in calculating backpay in ULP cases. *Amshu Assocs., Inc.*, 234 NLRB 791, 796 (1978) (quoting *W.C. Nabors*, 134 NLRB 1078, 1086 (1961)). *See also Pierre Pellaton Enters., Inc.*, 222 NLRB 555, 557 (1976) (including value of employer-provided room and board in backpay award); *Colo. Forge Co.*, 285 NLRB 530, 542 (1987) (including value of employer-provided room and board in interim earnings deducted from backpay). Additionally, the players receive free tuition, which also constitutes compensation. *See New Orleans Pub. Serv., Inc.*, 197 NLRB 725, 727 (1972).

The full scholarship each player receives for playing football, worth more than $60,000 per year, constitutes "at least a rudimentary economic relationship" between the players and the University. *WBAI*, 328 NLRB at 1274. No more is required to establish employee status. *See* DDE at 14-15.[16]

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[16] Northwestern has questioned whether the scholarship tender each player signs constitutes a "contract of hire." The common law standards that apply here do not require that there be such a contract. *See supra* note 3. But, in any event, a contract of hire is simply "an agreement in which an employee provides labor or personal services to an employer for wages or remuneration or other thing of value supplied by the employer." *Daleiden v. Jefferson City. Jt. Sch. Dist. No. 251*, 80 P.3d 1067, 1070 (Idaho, 2003), quoting Larson, *The Law of Workmen's Compensation*, 47.10 at 8 (1973). Such an agreement serves to define the remuneration or "other thing of value" that the employee will receive for his services. The tenders the players sign fit that description.

The factual record establishes that the Players perform valuable services for Northwestern, under its comprehensive supervision and control, and in return for compensation. Accordingly, the Regional Director's conclusion that the Players are "employees" within the meaning of Section 2(3) should be affirmed.

II. RECOGNIZING THE PLAYERS' STATUTORY RIGHTS TO ORGANIZE AND TO BARGAIN COLLECTIVELY IS CONSISTENT WITH THE POLICY OF THE ACT (QUESTIONS 2-3, 6)

Having determined that the players are employees under the common law test, the only remaining inquiry is whether recognizing the players' statutory rights as employees is consistent with the policy of the Act. Here, allowing players the choice to organize and have a collective voice in their working conditions, such as medical coverage and increased safety protections to minimize the risk of concussions and head trauma, is fully consistent with the policy of the Act.

Northwestern argues that the players cannot be employees under the Act because they are also students, relying primarily on the Board's decision in *Brown University*, 342 NLRB 483 (2004). *Brown*'s continuing validity is doubtful, *see supra* note 1, and in any event, as we show below, *Brown* is inapplicable because its analysis rests on factors that are entirely absent here, as the Regional Director held. *See* DDE at 18-20. But more fundamentally, Northwestern's contention that common law employees can be excluded from the Act if they can be characterized as "primarily" students is erroneous. No such exclusion exists under the law. Rather, as we discuss in Section A below, the case law demonstrates that the Board does not create "policy" exceptions denying employees their NLRA rights unless collective bargaining in that circumstance would not promote the purposes of the Act. And as we discuss in Section B, allowing the players to bargain over the terms and conditions of their football employment fully comports with the purposes of the Act. Accordingly, the players are entitled to the rights and protections provided employees under the Act.

A. Common Law Employees May Be Denied the Right to Bargain Only Where Collective Bargaining Would Not Promote the Purposes of the Act

Northwestern invokes several Board decisions as allegedly supporting its position that the players must be excluded from the protections of the Act because they are also students. We therefore begin with a detailed overview of the case law in this area. As will be shown, the Supreme Court and Board decisions establish that common law employees cannot be denied their NLRA rights absent a showing that collective bargaining in that setting would not promote the purposes of the Act.

1. The Supreme Court Caselaw

In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), the Supreme Court held that employees who are managers are not covered by the Act, because legislative history showed that Congress intended to exclude "the boss" from the protections granted to other employees. *See id.* at 282 (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess. 13 (1947)). And in *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981), the Court upheld the Board's conclusion that an employee who acts in a confidential capacity with respect to labor-relations matters, "although within the definition of 'employee' under § 2(3), may be denied inclusion in bargaining units," *id.* at 190, because such employees "in the normal performance of their duties may obtain advance information of the [c]ompany's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters." *Id.* at 179 (quoting *Hoover Co.*, 55 NLRB 1321, 1323 (1944)).

In *Bell Aerospace* and *Hendricks County*, employees were excluded from bargaining units because arms-length bargaining between labor and management as envisioned by the Act could not occur if management would be bargaining with an entity that represented part of

management itself (*Bell Aerospace*), or with an entity that represented employees who were privy to management's bargaining objectives and strategy (*Hendricks County*).

2. The Student Employee Cases

Northwestern argues, in effect, that just as the Act implicitly provides for "managerial employee" and "confidential employee" exclusions, so too does it provide for a "student employee" exclusion. Northwestern relies on a line of decisions – some overruled and others of dubious precedential value – in which the Board has found that certain types of employees who are "primarily students" of the institution that employs them should be excluded from coverage under the Act, or at least from the right to bargain collectively. But as we show, analysis of those cases confirms that student employees may be denied bargaining rights only where, as in *Bell Aerospace* and *Hendricks County*, collective bargaining would not promote the purposes of the Act – specifically where the alleged job duties are part and parcel of students' core academic programs to such an extent that bargaining over those duties would constitute bargaining over the academic process itself rather than over an economic relationship.

a. The Early Decisions

Until the 1974 decision in *The Leland Stanford Junior University*, 214 NLRB 621 (1974), the Board law on students working for their school was straightforward. Previously, in *Adelphi University*, 195 NLRB 639 (1972), the Board recognized that graduate assistants with teaching and research duties were engaged in "employment," *id*. at 640, but held that they could not be included in a unit with regular faculty members because "the graduate teaching and research

assistants here involved . . . are primarily students and do not share a sufficient community of interest with the regular faculty to warrant their inclusion in the [faculty unit]." *Id.*[17]

In *Stanford*, however, where a union sought to represent a unit consisting solely of research assistants, the Board erroneously treated *Adelphi* as if that case had rejected such a unit, stating:

> [W]e believe these research assistants are like the graduate teaching and research assistants who we found were primarily students in *Adelphi University*. We find, therefore, that the research assistants in the physics department are primarily students, and we conclude they are not employees within the meaning of Section 2(2) [sic] of the Act.

214 NLRB at 623. *Stanford* contains not a word to explain why a conclusion that research assistants are "primarily students" – which in *Adelphi* meant only that they could not be included in a unit of non-student employees due to the lack of a community of interest – should mean that they are not to be considered employees at all. It therefore is impossible to derive any principled rule from *Stanford*.

In *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976), involving housestaff at a teaching hospital, the Board again found that individuals who were "primarily students" were "not employees within the meaning of Section 2(3) of the Act." *Id.* at 253. But the Board rejected the idea "that students and employees are antithetical entities or mutually exclusive categories under the Act." *Id.* The Board determined that the housestaff were "students rather than employees" because the Board found that their activities essentially had *only* an educational purpose. *Id.* at 254. Indeed, the housestaff's patient-care activities were found to be "an integral part of a physician's educational training," *id.* at 252, constituting "simply the means by which

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[17] *See also Saga Food Service of California, Inc.*, 212 NLRB 786, 787 (1974) (noting other cases in which the Board excluded what the Board recognized to be "student *employees*" from units of non-student employees) (emphasis added).

the learning process is carried out," *id*. at 253, and conducted not to benefit the hospital "but rather to allow the student to develop, in a hospital setting, the clinical judgment and the proficiency in clinical skills necessary to the practice of medicine."[18] *Id.*

The narrowness of the holding in *Cedars-Sinai* was confirmed in *St. Clare's Hospital and Health Center*, 229 NLRB 1000, 1100 (1977). There, the Board undertook to explain more fully the approach to be followed in "cases…in which students perform services at their educational institutions which are *directly related* to their educational program." *Id.* at 1002 (emphasis added). The Board stated that "[t]he rationale for dismissing . . . petitions [for an election in such cases] is a relatively simple and straightforward one. Since the individuals are rendering services which are directly related to – and indeed constitute an integral part of – their educational program, they are serving primarily as students and not primarily as employees." *Id.*

The Board clarified the meaning of that distinction by explaining that, in "finding that housestaff are not 'employees,'" *id*. at 1003, the Board did not mean to suggest that they were outside the coverage of the Act, but rather that "extending bargaining privileges to residents, interns, and fellows would not be in the best interest of national labor policy," *id.* The Board based that conclusion on its view that to require collective bargaining over "[t]he educational process" would "unduly infringe upon traditional academic freedoms," *id.* at 1002-03. Accordingly, *St. Clare's Hospital* held that "when an individual is providing services at the educational institution itself as part and parcel of his or her educational development, . . . such a relationship should [not] be regulated through collective bargaining." *Id.* at 1003.[19]

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[18] In particular, the Board found that the housestaff programs were "[not] designed . . . for the purpose of meeting the hospital's staffing requirements." *Id.*

[19] In *San Francisco Art Institute*, 226 NLRB 1251 (1976), decided a few months before *St. Clare's Hospital*, a divided Board held that students working part-time as janitors for the art school they were attending could not constitute a unit for purposes of collective bargaining.

b. *Boston Medical Center* and *New York University*

More than twenty years passed before the Board again considered a case in which an employer contended that individuals performing services were "primarily students" who should not be allowed to engage in collective bargaining. In *Boston Medical Center*, another case involving hospital housestaff, the Board overruled *Cedars-Sinai* and *St. Clare's Hospital*, holding that "the interns, residents, and fellows employed by BMC, while they may be students learning their chosen medical craft, are also 'employees' within the meaning of Section 2(3) of the Act." 330 NLRB at 152. Recognizing, as the overruled cases had not, that employee status must be assessed in the light of the common law "master-servant relationship," the Board

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Stating that "the resolution of this question turns on whether the student janitors manifest a sufficient interest in their conditions of employment to warrant representation," *id.* at 1252, the Board "likened" the student janitors to "temporary or casual employees," but without finding that they actually fit within either of those categories, *id.* The Board concluded that the student janitors had only a "very tenuous secondary interest . . . in their part-time employment." *Id.* Without explaining how that interest would differ if the students had been working as part-time janitors for some other employer while attending art school, the Board cryptically declared that in that situation "the insubstantiality of their employment interest could not so readily be deduced." *Id.*

In *St. Clare's Hospital*, the Board cited *San Francisco Art Institute* as an example of "a … category of Board decisions involving students [who] are employed by their own educational institutions in a capacity unelated to their course of study." *St. Clare's*, 229 NLRB at 1001. The *St. Clare's* Board stated that "[i]n such cases, the Board has historically excluded the students from units which include nonstudent employees," and it added that the Board also had "not afforded them the privilege of being represented separately." *Id.* The only case *St. Clare's* cited for that latter proposition was *San Francisco Art Institute. See id.* at 1001 n.16. And to this day, *San Francisco Art Institute* is the only decision in which the Board has held that students working "in a capacity unrelated to their course of study," *id.* at 1001, do not constitute an appropriate unit due to their supposed lack of interest in their employment.

The notion that the Board is free to treat collective bargaining as a "privilege," *St. Clare's Hospital*, 229 NLRB at 1001, to be withheld whenever the Board "deduce[s]" that student employees have only a "very tenuous secondary interest ... in their part-time employment," *San Francisco Art Institute*, 226 NLRB at 1252, has nothing to recommend it. *See id.* at 1253-55 (Members Fanning and Jenkins, dissenting). But we need not belabor that point, because there can be no doubt that the Northwestern scholarship football players have more than a "very tenuous secondary interest" in their football duties and in the terms and conditions of employment under which they perform those duties. DDE at 21.

concluded "that whatever other description may be fairly applied to housestaff, it does not preclude a finding that individuals in such positions are, among other things, *employees* as defined by the Act." *Id.* at 160 (emphasis in original).

The Board rejected the contention "that the fact that housestaff are also students warrants depriving them of collective-bargaining rights." *Id.* at 164. The employer "argue[d] strenuously that by granting employee status to housestaff, the Board will improperly permit intrusion by collective bargaining into areas involving academic freedom." *Id.* But the Board saw that argument as "put[ting] the proverbial cart before the horse," *id*, stating:

> The contour of collective bargaining is dynamic with new issues frequently arising out of new factual contexts: what can be bargained about, what the parties wish to bargain about or concentrate on, and what the parties are free to bargain about, may change. But such problems have not proven to be insurmountable in the administration of the Act. We need not define here the boundaries between permissive and mandatory subjects of bargaining concerning interns and residents, and between what can be bargained over and what cannot. We will address those issues later, if they arise.

Id. [20]

On similar reasoning, in *New York University*, the Board found that graduate assistants at that university "perform services under the control and direction of the Employer, and they are compensated for these services by the Employer," thereby establishing employee status under Section 2(3). 332 NLRB at 1206. Rejecting the employer's contention that the graduate assistants "do not receive compensation but simply financial aid," *id.*, the Board concluded "[t]hat this is work in exchange for pay, and not solely the pursuit of education," finding that fact to be "highlighted by the absence of any academic credit for virtually all graduate assistant

[20] The Board further held that the medical residents were not "temporary" employees even though their employment was "of finite duration," with "nearly all" of them leaving employment after "a set period of time," often only three years. *Id.* at 166.

work," and noting that "working as a graduate assistant is not a requirement for obtaining a graduate degree in most departments. Nor is it a part of the graduate student curriculum in most departments." *Id.* at 1207.

As in *Boston Medical Center*, the Board refused to deny bargaining rights due to "speculation over what the [union] might seek to achieve in collective bargaining, or what might become part of an agreement between the Employer and the [union]." *Id.* at 1208. "While mindful and respectful of the academic prerogatives of our Nation's great colleges and universities, [the Board could not] say as a matter of law or policy that permitting graduate students to be considered employees entitled to the benefits of the Act will result in improper interference with the academic freedom of the institution they serve." *Id.* at 1208-09.

c. Brown University

In *Brown University*, 342 NLRB 483 (2004), decided four years after *New York University*, the Board overruled that case, but it did so on grounds that are not applicable here.

In *Brown*, as the majority viewed the record, the teaching duties of the graduate assistants who were seeking to organize were "part and parcel of the core elements of the Ph.D. degree." *Id.* at 488. "[F]or a substantial majority of graduate students, teaching [wa]s so integral to their education that they w[ould] not get the degree until they satisf[ied] that requirement." *Id.* In most cases, the graduate assistants' teaching was supervised by the faculty of the academic department in which the assistants were earning their degrees. *Id.* at 489. Furthermore, the teaching duties involved "only a limited number of hours" on the students' part, and "the money received by [the assistants who taught was] the same as that received by fellows [who did not teach]." *Id.* at 488.

In those circumstances, "even assuming arguendo … that graduate student assistants are employees at common law…," *id.* at 491, the *Brown* majority concluded that the fact that the

assistants' alleged job duties constituted part of their core academic program meant that bargaining with respect to those duties necessarily would "subject[ ] educational decisions to [the bargaining] process." *Id.* at 489. The majority believed that this "would unduly infringe upon traditional academic freedoms," *id.* at 490:

> Imposing collective bargaining would have a deleterious impact on overall educational decisions by the *Brown* faculty and administration. These decisions would include broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants' duties, hours, and stipends. In addition, collective bargaining would intrude upon decisions over who, what and where to teach or research – the principal prerogatives of an educational institution like Brown. [*Id.*]

In holding that educational decisions should not be made subject to collective bargaining, the majority reasoned that a student's academic relationship with his university is not an *economic* relationship as contemplated by the Act. *Id.*at 489. Furthermore, the majority stated that "the educational process … is an intensely personal one … not only for the student, but also for faculty," while, in contrast, collective bargaining is "predicated on the collective or group treatment of represented individuals," rendering it "not particularly well suited to educational decisionmaking." *Id.* at 489-90.

Although the dissent argued that experience had shown that collective bargaining by graduate assistants did not intrude on academic decisionmaking, *see id.* at 499-500 (Members Liebman and Walsh, dissenting), the majority insisted that bargaining necessarily "would improperly intrude into the educational process," *id.* at 493 (majority opinion), such that "there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process," *id.*[21]

[21] Issues similar to those addressed in *New York University* and *Brown* also arise where facilities provide rehabilitation assistance to disabled individuals. When an individual receiving such assistance performs duties at the facility as part of his or her rehabilitation program, the

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As the discussion above demonstrates, to the extent the Board fashions policy exceptions that exclude common law employees from coverage under the Act, or from being represented in a bargaining unit or engaging in collective bargaining, it does so only if permitting bargaining under those circumstances would fail to promote the purposes of the Act. As we show in Section B below, no such exclusion is present here.

B. To Allow the Players to Engage in Collective Bargaining With Respect to their Football Services Would Promote the Purposes of the Act.

Contrary to Northwestern's contentions, extending NLRA rights to the players is consistent with the purposes and policies of the Act expressed in Sections 1, 7, and 9, and no basis exists to deny them those rights.

1. *Brown* is Inapplicable to the Facts of This Case

Apart from the fact that the players here, like the graduate assistants in *Brown*, were required to be enrolled as students in order to be eligible for the work at issue – which the Board has never held to be sufficient in itself to deny employee status – every important consideration that the Board found to be present in *Brown* is absent here. Playing football is *not* "part and parcel of the core elements of the … degree." 342 NLRB at 488. Football is *not* "so integral to [the players'] education that they will not get the degree unless they satisfy [a football] requirement," *id.* – on the contrary, the players receive no academic credit for football, Tr. 173:4-10 (Colter), and football plays *no* part in satisfying their educational requirements. *See* DDE at

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Board has reasoned that "collective bargaining could constitute a harmful intrusion on the rehabilitative purpose of those programs." *Brevard Achievement Center, Inc.*, 342 NLRB 982, 988 (2004). There have been strong dissents from that view, *see id.* at 989-96 (Members Liebman and Walsh, dissenting), and the Board need not determine here whether *Brevard Achievement Center* and similar cases were correctly decided. The relevant point here is that those cases, like *Brown*, turn on a finding that *the duties at issue*, at their core, involve decisionmaking over a subject – in *Brown*, academic policies, and in *Brevard*, therapeutic judgments – that is not amenable to collective bargaining.

11, 18, 19. Football work is *not* supervised by the faculty from whom the players are earning their degrees, *Brown*, 342 NLRB at 489; indeed, the coaches are not members of the faculty. Tr. 178:9-13 (Colter). "[T]he [grant] money received by [the players is *not*] the same as that received by [students who do not play football]." *Brown*, 342 NLRB at 488. Football is *not* "an intensely personal [activity]," but rather a "collective or group [activity]." *Id.* at 489-90.

The facts that were emphasized in *Brown* but are absent here were essential to the decision in *Brown*, as they had been in *St. Clare's Hospital*, on which the *Brown* majority relied.[22] It was only because the majority found the graduate assistants' teaching duties to be *part and parcel of their academic work* that the majority concluded that bargaining by the graduate assistants necessarily would "subject[ ] educational decisions to [the bargaining process]," thereby "unduly infring[ing] upon traditional academic freedoms." *Id.* at 489.

That conclusion may well have been erroneous, *see id.* at 499-500 (Members Liebman and Walsh, dissenting), but that question need not be addressed here. What is crucial about the majority's analysis in *Brown* is that, had the majority believed that there was only a *limited possibility* that bargaining over the graduate assistants' teaching duties might intrude upon academic decisionmaking, the majority could not have held, as it did, that the assistants had no right to bargain over *anything*. After all, academics is not the only area as to which the Act recognizes "an employer's need for unencumbered decisionmaking" regarding certain subjects. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 679 (1981). That need is satisfied by defining the mandatory subjects of bargaining in a way that gives due weight to the employer's interests. *Id. See also Peerless Publ'ns*, 283 NLRB 334, 336 (1987) (explaining that subjects of bargaining may be restricted in order to preserve a newspaper's right to promote "editorial

[22] It should be noted, however, that *Brown* did not fully endorse the analysis in *St. Clare's Hospital*. *See id.* at 490 n.25.

integrity"). If the result in *Brown*, holding that the graduate assistants could not bargain about *any* subject, can be justified, it is only if the majority was correct in concluding that the graduate assistants' duties were so pervasively academic that bargaining over those duties necessarily would "intrude into the educational process" in a manner that would "unduly infringe upon … academic freedoms." *Brown*, 342 NLRB at 489.

Here, in contrast, there is no basis to find that bargaining with respect to football duties would inherently intrude upon the educational process, much less that Northwestern's academic freedom would be threatened by such bargaining. CAPA's primary bargaining objectives are to improve player safety (particularly as relates to concussion and brain trauma), medical protection and other benefits. Tr. 291:25-293:3 (Colter); Jt. Ex. 1 at CAPA 0008; Jt. Exs. 3, 6. Although Northwestern claims to fear that CAPA might seek to negotiate a grievance procedure that would extend to academic decisions, or to negotiate relaxed academic standards for players, *see* Request for Review at 37-38, those are *not* part of CAPA's agenda.

In any event, if a union of college players someday were to seek to bargain over such academic matters, and if Northwestern is correct in stating that such bargaining should not be permitted, the proper approach would be to hold under *First National Maintenance* and its progeny that those are not mandatory subjects of bargaining, not that players cannot bargain at all. In *Boston Medical Center*, the Board observed that it "need not define here the boundaries between permissive and mandatory subjects of bargaining concerning interns and residents, and between what can be bargained over and what cannot," because the proper course would be to "address those issues later, if they arise." 330 NLRB at 164. The same is true here. CAPA seeks to bargain over safety, benefits, and other terms and conditions of the players' duties as football players. Those are perfectly appropriate subjects of bargaining, which have nothing to

do with academic decisionmaking, and to permit bargaining with respect to them is "consistent with the Act's avowed purpose of encouraging and protecting the collective bargaining process." *Sure-Tan*, 467 U.S. at 892. In the unlikely event that CAPA ever were to seek to bargain over academic decisions or anything else that Northwestern might regard as not appropriate for bargaining, whether Northwestern should be required to bargain over such matters could and should be resolved at that time. However such questions might then be resolved, this would not call into question the appropriateness of recognizing the players' right to bargain over safety, benefits, and other nonacademic subjects.

2. Employees Cannot Be Excluded From the Act Based on a Notion They Are "Primarily" Students

Northwestern seeks to read *Brown* as calling for an open-ended and standardless inquiry into whether a student employee is "primarily" a student or "primarily" an employee. But as we have seen, *Brown* and the earlier Board decisions on which *Brown* relied turn on whether collective bargaining would effectuate the purposes of the Act, not on whether student employees devoted more of their time to academics or to work, or whether they placed more subjective value on the one activity or the other.

If it were relevant, the record shows that the players spend "a lot more time dedicating [them]selves to football, performing football activities…, than academics," Tr. 177:1-15 (Colter), and that a scholarship football player at Northwestern is "first and foremost an athlete, an employee of the school who provides an athletic service," for whom football is the "first priority," Tr. 166:18-20, 177:17-21 (Colter).[23] But nothing in the language or purposes of the

[23] Although Coach Fitzgerald claimed that academics take priority over football, the actual goals he conveys to the players indicate otherwise:

> In the short term, as I work with our guys, the goals are:
> To consistently prepare for victory.

Act makes such comparisons crucial in the first place. A player can be both a dedicated student *and* a dedicated employee. That is the case here. The right of Northwestern's scholarship football players to be represented as employees with respect to their *football* duties is not forfeited merely because they engage in *other* activities as students.

To recognize the players as employees is not to diminish their status as students. Nor is it to deny that participation in Northwestern's football program imparts "life lessons" or "life skills," as Northwestern has urged. But, even if CAPA intended to bargain about those "life lessons" or "life skills" – which it does not – that would not implicate the kinds of "genuinely academic decision[s]," *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985), into which courts and agencies hesitate to intrude, and which were the majority's concern in *Brown*. *See Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013) ("some … deference" was owed to a university's "academic judgment," but not to other decisions by the university); *Kunda v. Muhlenberg Coll.*, 621 F.2d 532, 547 (3d Cir. 1980) ("[i]t does not follow that because academic freedom is inextricably related to the educational process it is implicated in every employment decision of an educational institution").

The "life lessons" and "life skills" Northwestern has described are more in the nature of what one learns on a *job* than what one learns in an academic program. As Kain Colter testified, "[p]erforming any type of job helps build … these human values …. They didn't help me get my psychology degree." Tr. 174:18-23. Indeed, Coach Fitzgerald testified that the life lessons

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> To win our division.
> To win the Big Ten championship.
> And then to win the national championship.
> To prepare to be a champion in life.
> And to earn a Northwestern degree.
> So those are the emphases that we make every year.

Tr. 1023:23-1024:7 (Fitzgerald). *See also supra* at 16-17, showing that the football schedule takes priority over a player's academic schedule.

he seeks to impart to the players are similar to those he learned *on the job* as an assistant coach. Tr. 1139:25-1141:3. That playing football may impart important lessons and values does not convert football decisions into *academic* decisions of the kind that *Brown* would exclude from bargaining, any more than the fact that working on a university grounds crew might impart important lessons and values (about the value of hard work, or of working as part of a team) would convert work on the grounds crew into an academic matter that should be exempt from bargaining.

3. The Existence of Outside Constraints on Bargaining Provides No Basis to Deny the Players Their Statutory Rights

Finally, Northwestern has suggested that collective bargaining would not serve the purposes of the Act because it would be constrained by NCAA rules, which CAPA has stated it will not seek to override in bargaining. "But we note that there are often restrictions on bargaining due to outside influences, *e.g.*, contracts an employer may have with other concerns that require the employer to conduct its business in a specific manner, or specifications in a contract that limit what an employer may or may not do." *Boston Medical Center*, 330 NLRB at 164. As long as some areas remain open for bargaining, the policies of the Act require that bargaining be allowed to take place.

That is certainly the case here. Although current NCAA rules place restrictions on the compensation that member schools may provide to football players, many areas remain open for bargaining. For instance, one of the serious issues impacting football today is the problem of concussions. As Northwestern Associate Athletic Director Brian Baptiste acknowledged, even under current NCAA rules, there are steps Northwestern could agree to take to improve player safety, such as limiting the amount of contact in practice. Tr. 597:22-25; *see also* Tr. 292:2-10 (Colter). In addition, NCAA rules allow Northwestern to provide the players with full medical

insurance, which it does not presently do. Tr. 292:24-25 (Colter); Tr. 596:11-14, 596:24-597:7 (Baptiste). And if a player suffers an injury playing football, there is presently no guarantee that Northwestern will cover all the expenses. Northwestern simply chooses how long it will provide such coverage, generally for a year after the player's final season of competition has ended, but sometimes longer. Tr. 804:1-805:5 (Blais). NCAA rules also allow institutions to provide an assistance fund for athletes who have particular financial needs, which Northwestern uses to assist individual players with such things as clothing and medical insurance needs. Tr. 544:16-546:7, 560:18-561:3 (Baptiste). Players could also bargain with Northwestern to provide assistance for more than four years to players who need additional time to finish their degrees. Tr. 293:1-3 (Colter).[24] Thus, numerous areas remain open for bargaining without violating NCAA rules.[25]

In any event, even where an employer has no authority at all with regard to economic terms, which is *not* the case here, it is not for the Board to make an "assessment of the quality and/or quantity of factors available for negotiation." *Management Training Corp.*, 317 NLRB 1355, 1358 (1995). Rather, it is for the employees to "decide for themselves" whether they wish

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[24] Fellow Big Ten member Indiana University recently announced a new "bill of rights" for its athletes, which includes providing financial support to former athletes who wish to return to complete their degree. *See* http://www.iuhoosiers.com/genrel/062714aab.html. Of course, without the contractual guarantee that results from collective bargaining, these new "rights" can also be taken away at the university's discretion.

[25] We also note that NCAA rules are in a process of change, which could open additional areas for bargaining. Tr. 291:25-293:3 (Colter). For instance, the NCAA Division I Board of Directors has endorsed a proposal that would provide the universities in the "five highest-resource conferences" – which includes the Big Ten Conference – more "autonomy" in various areas, including increasing scholarship amounts and covering player expenses associated with practice and competition. *See* http://www.ncaa.org/about/resources/media-center/news/di-board-endorses-restructuring-seeks-feedback-schools. NCAA rules may also change as a result of pending antitrust challenges. *See infra* note 28; *see also Boston Medical Center*, 330 NLRB at 164 ("The contour of collective bargaining is dynamic with new issues frequently arising out of new factual contexts.").

to engage in collective bargaining within whatever practical constraints may exist. Northwestern's scholarship football players must be given that choice.

* * *

In sum, the players are employees under Section 2(3) and collective bargaining would not inherently intrude into academic decision-making or be rendered inoperative by outside constraints. Accordingly, no policy of the Act would justify denying the players their NLRA rights.

III. THERE ARE NO "POLICY" REASONS TO DENY THE PLAYERS THEIR NLRA RIGHTS (QUESTIONS 3-4)

The policies of the *Act* that are relevant have been discussed above, and they support affording the players their rights as employees. Northwestern has raised other issues, having no connection to the NLRA, that it portrays as involving matters of public policy. But none involves anything that the law recognizes as a public policy. Rather, these "policy" arguments are variations on the theme routinely sounded by employers who resist collective bargaining: that bargaining may be "bad for business." Such employer-interested "policies" do not trump Section 1, 7, and 9 rights. If employer "sky-is-falling" predictions were sufficient to restrict Board action, there would be no NLRA rights. And in any event, the concerns Northwestern raises are based on speculation and conjecture.

1. Northwestern suggests some unspecified harm might befall NCAA football if players at some schools were to gain bargaining rights while players at competing schools did not. If Northwestern's contention is that bargaining may result in different outcomes across different employers – whether due to differences in state laws or employee preferences – this is neither uncommon nor inherently problematic. No adverse "public policy" is created by Northwestern players successfully bargaining, for example, for reduced contact in practices to

minimize the risk of head injuries. To the extent that some universities where players are not organized might now follow suit, that would simply show the value of collective bargaining in this setting.

If what Northwestern fears is that players who are organized might receive dramatically greater compensation than players at other schools, that would not happen as long as the current NCAA rules remain in place. If the NCAA rules were to change such that there would be greater room for players to seek improved financial benefits through collective bargaining, the extent to which this might result in significant differences in the financial benefits provided to football players by the various schools would remain to be seen. After all, if unreasonable demands were made by players, presumably universities would not agree to them.[26]

This is not to deny that the NCAA and its member schools have created a system – and a product, *see NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984) – that is based on denying players the ability to seek improved financial benefits, while the schools, coaches and NCAA officials all reap immense profits. If the players' rights as employees are recognized, there may be some fundamental changes in how the NCAA and its member institutions run their football programs. Many commentators have argued that such change is needed because the current system exploits players in ways that should not be countenanced.[27] There also are serious

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[26] If bargaining *were* to result in significant differences between schools as regards the financial benefits offered to football players, this would not harm competitive balance in college football. As Professor Berri testified, today only a small number of universities seriously contend for major conference titles each year, and their success becomes self-perpetuating, as top high school players have little reason to select a program that is not likely to have success; but if financial benefits were to become part of the equation, schools that traditionally have not been able to compete successfully at the highest levels would have an opportunity to attract better players by offering greater benefits, which would have the effect of *increasing* competitive balance. Tr. 386:25-393:12, 424:19-425:13, 430:8-24, 443:20-444:19 (Berri).

[27] Numerous scholarly articles have concluded that scholarship players should have bargaining rights as statutory employees under the NLRA, and many of those articles argue that

arguments that the existing restraints on financial benefits for players violate the antitrust laws.[28] It is not for the Board to consider such questions. But by the same token, the dubious NCAA system is not entitled to favored status under the Act on some notion that what is good for NCAA football is good for the country – any more than the Board would grant or deny bargaining rights based on consideration of how bargaining might affect a symphony orchestra, a professional sports franchise, a widget manufacturer, or any other kind of employer.

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without such rights the players are subjected to economic exploitation. *See* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 Wash. L. Rev. 71, 86 (2006) ("The NCAA purposely created the term 'student-athlete' as propaganda, solely to obscure the reality of the university-athlete employment relationship and to avoid universities' legal responsibilities as employers [and] [i]n the ensuing fifty years, the NCAA, colleges, and universities have profited immensely from the vigorous defense and preservation of this myth.") *See generally* Nicholas Fram & T. Ward Frampton, *A Union Of Amateurs: A Legal Blueprint To Reshape Big-Time College Athletics*, 60 Buff. L. Rev. 1003 (2012); Christian Dennie, *Changing The Game: The Litigation That May Be The Catalyst For Change In Intercollegiate Athletics*, 62 Syracuse L. Rev. 15, (2012); J. Trevor Johnston, *Show Them The Money: The Threat Of NCAA Athlete Unionization in Response To the Commercialization Of College Sports*, 13 Seton Hall J. Sport L. 203 (2003); Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 Hamline L. Rev. 24 (2000); Leroy D. Clark, *New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue*, 36 Howard L.J. 259 (1993).

[28] *See, e.g., In re NCAA Student Athlete Name & Likeness Licensing Litig.* No. C09-1967, 2014 WL 1410451, at *4-5 (N.D. Cal. Apr. 11, 2014); *Rock v. NCAA*, No. 12-cv-1019, 2013 WL 4479815, at *14-15 (S.D. Ind. Aug. 16, 2013; *Agnew v. NCAA*, 683 F.3d 328, 346-47 (7th Cir. 2012); *White v. NCAA*, No. 06-cv-0999, Dkt. No. 72 (C.D. Cal. Sept. 20, 2006); *In re NCAA I-A Walk-on Football Players Litig.*, 398 F. Supp. 2d 1144, 1150-51 (W.D. Wash. 2005).

In addition, a three-week bench trial recently concluded in an Oakland federal court involving an antitrust challenge to NCAA rules prohibiting college football and men's basketball players from profiting from the use of their name, image, or likeness. *See O'Bannon v. NCAA*, No. 09-cv-3329 (N.D. Cal.). The NCAA also recently agreed to pay $20 million to current and former college football and men's basketball players to settle a related antitrust lawsuit involving the use of player names, images, or likenesses in video games. *See Keller v. NCAA*, No. 09-cv-1967 (N.D. Cal.), at Dkt. No. 1138, Ex. 1. This is in addition to the $40 million that Electronic Arts, Inc., the producer of the video games, agreed to pay to settle claims against it. *Id.* at Dkt. No. 1108, Ex. 2. There are also multiple antitrust lawsuits pending against the NCAA challenging various rules restricting the financial benefits that players can receive. *See Alston v. NCAA*, No. 14-cv-1011 (N.D. Cal.); *Jenkins v. NCAA*, No. 14-cv-1678 (D.N.J.); *Floyd v. NCAA*, No. 14-cv-1290 (D. Minn.); *Kindler v. NCAA*, No. 14-cv-2390 (N.D. Cal.).

2. The same points dispose of Northwestern's suggestion that allowing collective bargaining by football players would violate some undefined public policy by reducing the funds for non-revenue sports. This again assumes that universities like Northwestern would agree in bargaining to devote substantially greater resources to football. And it assumes as well that the burden of producing funds for non-revenue sports should fall uniquely on *football players*, in a world where the football *coaches* are paid millions of dollars and where universities have many sources of funds to devote to their various programs, athletic and otherwise. There is no public policy that nonrevenue sports must be supported by profits from football, or that football profits must be maximized at the expense of the players.[29]

3. Northwestern suggests that if the Board were to hold that the players are employees, the result might be that the tuition-grant portion of their scholarships would become taxable as income. But there is no reason why the factors that determine when a scholarship will be taxable under the Internal Revenue Code should be the same as those that determine when a scholarship recipient will have a right to engage in collective bargaining under the NLRA.

The provisions of the Internal Revenue Code that govern scholarships do not use the word "employee." *See* IRC § 117(a)-(c). The Code does provide for taxation of "that portion of any amount received which represents payment for teaching, research, or other services by the student required as a condition for receiving the qualified scholarship." *See id.* § 117 (c)(1). But, in determining whether there has been such "payment," the IRS does not look for only a "rudimentary economic relationship," as is the inquiry in determining employee status under Board law. *See supra* at 20-21. Employee status can exist under the NLRA in circumstances where an individual may receive compensation during some periods that he is not actively

[29] The suggestion that bargaining for greater benefits for football players would present problems under Title IX also is unsound, as we show in Section IV *infra*.

performing services, *see supra* note 8, but the IRS does not find "payment for services" within the meaning of § 117(c)(1) if an athlete may retain his scholarship while not playing. *See* Rev. Ruling 77-263 (1977). It is not that either the IRS or the Board is incorrect; they are answering different questions under different statutes, involving different purposes and interests. That being so, the Board's decision here should have no effect on the tax treatment of football scholarships.

4. Finally, we note that the existence or absence of determinations regarding the employee status of scholarship football players under other statutes or in other contexts is not relevant to the determination of the players' employee status under the *Act*. As we have shown, the appropriate inquiry here is whether the players satisfy the common law test of employee status – *i.e.*, whether they perform services for Northwestern, under its direction and control, and in exchange for compensation – and whether permitting collective bargaining under the circumstances presented here comports with the policies of the Act. We are not aware of other contexts where this same inquiry has been made, and determinations of employee status in different settings applying different tests with different policy considerations neither leads to nor follows from a determination of employee status under the Act.

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In sum, there are no "public policy" reasons to deny the players their statutory rights as employees under the Act.

IV. TITLE IX AND TITLE VII ARE IRRELEVANT IN DETERMINING WHETHER THE PLAYERS ARE EMPLOYEES UNDER SECTION 2(3) (QUESTION 5)

Question 5 in the Briefing Notice asks "[t]o what extent are the employment discrimination provisions of Title VII, in comparison to the antidiscrimination provisions of Title IX of the Education Amendments Act of 1972, relevant to whether grant-in-aid scholarship

football players are 'employees' under the Act?" Northwestern also has invoked Title IX, claiming if male football players can engage in collective bargaining, this will create compliance problems under that statute. In reality, Title IX is a non-issue.

That the football players as university employees are protected against unlawful discrimination under Title VII, in addition to the protections they receive under Title IX, has no bearing on whether they are "employees" under the NLRA. Such dual protections were contemplated by Congress when Title IX was enacted. As the Supreme Court has explained, "Title IX is a broadly written general prohibition on discrimination," *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005), and employees are encompassed within its protections. *See North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 520 (1982) (Title IX's "broad directive" that "no person" shall be subject to gender discrimination "on its face…include[s] employees as well as students"). Thus, in enacting Title IX, Congress recognized that some individuals may have protections against employment discrimination under both Title IX and Title VII. *Id.* at 530 (legislative history confirms that "employment discrimination comes within the prohibition of Title IX"); *see also Fitzgerald v. Barnstable Sch. Committee*, 555 U.S. 246, 258 (2009) ("Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools"). Accordingly, there is nothing incongruous in the fact that some college athletes covered by Title IX are, as employees, covered by Title VII as well.

Nor does this case create tension with Title IX compliance. Northwestern suggests that if collective bargaining produced benefits for the football players, Northwestern might have to provide such benefits to female athletes. As an initial matter, Northwestern fails to explain how CAPA's goal of obtaining additional safety protections to reduce the risk of concussions in football, for example, would have any adverse effect on female athletes. Indeed, such a result

would likely benefit female athletes as concussions and head injuries are a serious issue in women's sports as well.

In any event, Northwestern's speculative and hypothetical Title IX concerns cannot serve to deprive the football players of their rights under the Act. With respect to benefits, *see* 34 C.F.R. § 106.41, Title IX does not require the kind of equivalence that Northwestern has suggested. The Department of Education recognizes that "[s]ome aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities," including factors such as equipment and the "rates of injury resulting from participation" in the sport. *See* A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979). Indeed, the DOE makes clear that "[f]or the most part, differences involving such factors will occur in programs offering football, and consequently these differences will favor men." *Id.* at 71,416.

And while DOE regulations provide that if a university "awards athletic scholarships or grants-in-aid," it must provide "reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics," 34 C.F.R. § 106.37(c)(1), DOE has explained that this "does not require a proportionate number of scholarships for men and women or individual scholarships of equal dollar value." 44 Fed. Reg. at 71,415. Rather, the "total amount of scholarship aid made available to men and women must be substantially proportional to their participation rates" unless the "disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors." *Id.*

The DOE issued its regulation against the backdrop of the NCAA grant-in-aid practices. If that world were to change – due to antitrust litigation, NLRB decisions, NCAA rule changes,

or anything else – the DOE would have to consider whether its existing regulation sufficiently addresses the new situation, and if so, whether, any increase in funds devoted to football in comparison to those devoted to sports in which female athletes participate is justified by "legitimate, nondiscriminatory factors." *Id.* Among other options, the DOE might choose to refine its "grant-in-aid" regulation so as to address financial benefits that may differ from the "grants-in-aid" contemplated by the current regulation.

But however the DOE might choose to apply or modify its regulations to take account of any changes that might result from collective bargaining, Title IX, which does not contain any provisions dealing specifically with scholarships or athletic aid, would continue to require simply that "[n]o person…shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681(a). The extent to which that may require financial equivalence between men and women with regard to any particular element of an "education program or activity" depends on the circumstances.[30] Northwestern today spends substantially more on men's sports than women's sports, provides almost $2 million more in scholarship aid to its male athletes than to female athletes, pays the head football coach more than all the head coaches of its women's teams together, and spends more money on the football program than on all of its women's sports combined. Er. Ex. 11 at NU001962; Tr. 696:10-20 (Green). It therefore is difficult to understand why Northwestern contends that any increase in

[30] *See, e.g.*, 34 C.F.R. § 106.54 (focusing on whether pay disparity exists for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions"); *Stanley v. USC*, 13 F.3d 1313, 1321, 1323 (9th Cir. 1994) (citing the "substantial public relations and promotional activities" required and "relative amount of revenue generated" as factors justifying greater pay for men's basketball coach over women's basketball coach).

funds for football that might result from collective bargaining would require the University to devote more funds to women's sports, where no such equality exists at Northwestern today.

But in the event Northwestern was required to devote more resources to women's sports, Northwestern fails to demonstrate that this would be a bad thing, much less that such a result would be contrary to any public policy relevant to the Board's decision-making.

CONCLUSION

Applying established legal principles to the factual record, the Regional Director correctly found that the Northwestern football players who receive grant-in-aid scholarships are "employees" within the meaning of Section 2(3). As employees, the players are entitled to organize and to bargain collectively over the terms and conditions of their employment. That determination fully comports with the policy of the Act, and no legal basis exists for excluding these players from the protections of the Act. Accordingly, the Regional Director's Decision and Direction of Election should be affirmed.

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I certify that the foregoing Brief for Petitioner College Athletes Players Association was served via email on July 3, 2014 to:

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